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Facultative mixity in the international legal order – tolerating European exceptionalism?

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1 Introduction

Is the practice of mixed agreements an aberration in international law? Or has this well-established practice, accepted by the Union, its Member States, and their treaty partners, contributed to the development of international law? International organizations are not only bound by international law, but may also contribute to its development. This chapter argues that the practice of mixity can contribute to the development of new rules that are applicable between the European and its Member States (EU/MS) and non-EU states. The International Law Commission (ILC), which is responsible for the codification and progressive development of international law, has referred to the practice of mixity, for example, when discussing the issue of joint responsibility of an international organization with one or more States in the context of developing its *Draft Articles on the Responsibility of International Organizations*.¹ The practice of mixity, and the legal questions associated with the practice, can be used as evidence demonstrating the development of rules of customary international law. The practice of ‘mixity’ is sometimes presented as being an anomaly in international law, viewed as a practice whereby the EU and its Member States subject third countries to the complexities of the EU’s internal legal machinery, in turn, creating unjustified complications for those states. Another view is that, the practice of mixity is mandated by international and EU law, and that is required to allow the EU, which has limited competences, and its Member States, to join an international agreement.² Another argument is that in certain cases, mixity would constitute a *violation* of international law. In cases of facultative mixity, where the legal requirement for mixity is absent under EU law, the reasons for exposing the EU’s external partners to the complexities of mixity would fall away. Rather than debating whether mixity is a form of exceptionalism in favour of the Union, international lawyers should also grapple

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¹ For the Draft Articles on the Responsibility of International Organizations with Commentaries, see Report of the International Law Commission, 63rd sess, UN Doc. A/66/10, p. 52.

² See chapters by Weiß and Colas in this volume.

with the legal questions raised by mixity, and how the practice may have contributed to the progressive development of rules, in the fields of international responsibility and the law of treaties.³

The first part discusses the concept of ‘European exceptionalism’ in international law. Such ‘exceptionalism’ is usually discussed in binary terms – it is either presented as a *necessary consequence* of the Union’s unique nature, or as a form of unjustified *special treatment* that is not afforded to other treaty parties. The chapter concludes by presenting a third option: the practice of mixed agreements is a novel solution to the problems posed by the ‘incomplete’ or partial nature of the EU’s powers, and has, over time, developed rules of international law that apply in the relations between states and international organizations. The concept of ‘exceptionalism’ is a useful analytical lens through which to examine the EU’s practice of mixed agreements. First, it deals with the normative question of whether the practice of concluding mixed agreement is appropriate. It does, after all, apply to only one specific situation: the conclusion of agreements by the EU. Second, it helps analyse whether, and to what extent, the EU’s internal legal order, should be relevant when assessing questions of international law. This is a question that is often over-looked by international lawyers. The second part makes the case for analysing mixity as a form of state/organization practice that contributes to the development of international law. Whereas much of the existing literature on mixity and international law has focused on questions related to the international responsibility of the EU/MS with regard to mixed agreements, there are numerous other legal complications that have arisen from the practice. Through addressing these legal complications over time, such practice contributes to the development of treaty practice between states and international organizations. The final part turns towards the EU’s treaty making process, analysing some of the international legal issues that arise regarding the practice of concluding mixed agreements. It shows how the practice of mixity can give rise to numerous complications under international law in areas such as representation, entry into force, provisional application, international responsibility, and implementation. Rather than viewing such practice as unwarranted exceptionalism, or even violations of international law, it is argued that such practice can also contribute to the development of international law.

2 European Exceptionalism?

The European Union is not a normal treaty actor. Unlike states, it does not possess the full range of powers, and is can be viewed as an ‘incomplete’ legal subject in international law. Mixity is a novel solution to this incomplete nature. It allows the EU and the Member States to combine their competences in order to join an international agreement.⁴ Schütze argues that one of the original reasons for mixity the nature of the international legal order, which did not account for incomplete subjects such as the EU. Mixity developed in part due to “*the originally hostile stance of international law towards the external relations of non-state actors.*”⁵ One may question whether this ‘hostile stance’ has given way over time, as the EU/MS have now concluded a great number of mixed agreements, both multilateral and bilateral.

³ See Draft Conclusions on Identification of Customary International Law, with Commentaries, Report of the International Law Commission, 70th sess, UN Doc. A/73/10, p. 119. 65. Draft Conclusion 4(2) provides that “[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.” See also JED ODERMATT, ‘The Development of Customary International Law by International Organizations’, (2017) 66 *ICLQ* 2, p. 491.

⁴ ROBERT SCHÜTZE, ‘Federalism and Foreign Affairs: Mixity as a (Inter)national Phenomenon’, in: HILLION & KOUTRAKOS (eds), *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford, Hart Publishing, 2010, p. 195: “*Lacking plenary treaty-making power, the Union could not develop an internal mechanism to integrate the Member States’ foreign affairs interests, and therefore had to fall back on the external mechanism of mixed agreements.*”

⁵ SCHÜTZE, *supra* fn 4, p. 195.

One of the criticisms of the practice of mixity from the international law perspective has been that it essentially turns an internal question – the issue of competences in the EU system – and externalises it. This while international law, for the most part, is uninterested in the domestic legal orders of its subjects. This principle, that internal legal orders (of states and IOs) is not relevant for the application of many rules of international law, is reflected in treaties and other instruments. For example, Article 27(2) of the 1986 *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* ('VCLT-IO') provides that "an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty."⁶ This provision corresponds with Article 27 of the 1969 *Vienna Convention on the Law of Treaties*,⁷ and Article 27(1) VLCT-IO, according to which a State party to a treaty may not justify its failure to perform an international obligation based on its internal law. Likewise, for the purposes of international responsibility, an IO may not invoke its own internal rules to justify the failure to perform a treaty obligation.⁸ This principle applies to the "internal law" of States and the "rules of the organization" with regard to IOs.

This does not mean, however, that international law cannot also take into account the internal legal order in certain circumstances. Non-EU states should not be expected to understand and stay abreast of the EU's internal legal order, which continues to develop and evolve over time. However, the EU's treaty partners have given their consent to allow the EU/MS to accede to multilateral conventions and have concluded bilateral mixed agreements with the EU/MS, and in doing so have implicitly recognized the importance of the issue of competences for the EU/MS. As discussed below, non-EU states have requested that they be informed of the balance of competences, for example, through declarations of competences. Such practice could point to acceptance by non-EU states that the internal legal order of the EU is relevant, under certain circumstances, since they have consented to international treaties that deal with this very issue. Another argument is that, in the case of international organizations, the "rules of the organization" should not be equated to the internal law of a State for all purposes.⁹ Unlike domestic law, the rules of an organization have a dual character: they constitute both the internal legal order of an international organization, as well as an international treaty that is binding on members of that organization. This goes to a fundamental question in international law about the nature of an international organizations' internal law. As Brölmann points out, "[t]he constituent instrument is seen either as a treaty (with which the organisation is equated), or as a constitution underlying the independent existence of the organisation."¹⁰ The EU Treaties also have a dual character; they comprise part of the constitutional order of the European Union and its Member States, and can thus be viewed as the internal law of that legal order, but also retain their character as legal instruments on the plane of international law. Even if the EU Treaties and the EU's internal law can be considered as having an international law character, they are only applicable to the EU Member States and the EU, and cannot be opposable to non-EU states. The principle of *res inter alios acta*, that a treaty cannot bind third states, would mean that EU law (which is only binding on the EU/MS) cannot be applied in order to assess, for example, the extent of the EU's obligations under an agreement with a third state.¹¹ However, by consenting to conclude a mixed agreement with the EU/MS, a third state has accepted that to some

⁶ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 25 ILM 543, not yet in force ('VCLT-IO').

⁷ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (VCLT).

⁸ See 27(2) VLCT-IO. This principle is also reflected in Article 32 of the ARIIO.

⁹ See CHRISTIANE AHLBORN, 'The Rules of International Organizations and the Law of International Responsibility' (2011) 8 *International Organizations Law Review* 2, p. 398; JEAN D'ASPREMONT, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility', (2012) 9 *International Organizations Law Review* 1, p. 26.

¹⁰ CATHERINE BRÖLMANN, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties*, Oxford, Hart Publishing, 2007, p. 144.

¹¹ See Article 34 VCLT.

extent, the internal law of the EU can be taken into account. By concluding the agreement as mixed, it has implicitly accepted the relevance of EU competences, as it has agreed that the EU/MS must comply with EU law when implementing the agreement.¹² In instances where the terms of the agreement make references to the nature of the EU legal order, for example by including a declaration of competence clause, this argument of implicit acceptance is stronger.

The provisions quoted above relate mainly to the issue of international responsibility. The literature regarding the international law issues related to ‘mixity’ has mostly focused on this issue.¹³ This is understandable, given the fact that mixed agreements usually do not address the issue of how responsibility is to be apportioned. The issue also received attention during the period when the ILC was developing its Draft Articles on the Responsibility of International Organizations. One of the questions the ILC addressed was whether there should be a specific article or articles dealing with the attribution of responsibility in cases related to the Union (or supranational organizations). The argument was essentially that the Union is qualitatively different from other international organizations, in particular due to the high number of treaties to which the Union is a party alongside its Member States. Moreover, the fact that in most cases the Union’s international obligations are implemented through EU legislation, but then enforced through the authorities of EU Member States, gave rise to questions about whether a special rules of responsibility had emerged regarding the EU (or organizations like the EU). In addition to these complex questions regarding responsibility, the practice of mixity has also given rise to questions regarding, for instance, the law of treaties. Some of the legal issues faced by the EU/MS and third states relate to how to apply these rules, such as during provisional application (discussed *infra* section 4.2).

If the practice of mixity only applies in relation to the EU, and not to other subjects of international law, should it be understood as a form of ‘European exceptionalism’? This term has been defined in a number of ways. The first definition of exceptionalism in international law is that of a *double standard*. Safrin defines exceptionalism: “A nation that is “exceptional” seeks to apply a legal rule for itself that differs from an existing or emerging international norm as reflected in a multilateral treaty...”¹⁴ This definition stems from the one first developed in reference to the United States, in cases where it was argued that the US sought to develop international rules that apply to it, but not to other states.¹⁵ European exceptionalism in this sense would mean that the EU and its Member States seek to be bound by a certain set of rules that are not applicable to others. Such an exception may be based on, for instance, the “self-understanding on the part of EU institutions according to which their purported fidelity to principles of human rights, democracy, and the rule of law justifies exempting them from certain international standards tailored to states.”¹⁶ Gráinne de Búrca understands exceptionalism in terms of the EU not living up to its own professed fidelity towards human rights standards.¹⁷ These accounts of exceptionalism view it as a form of unjustified double standards.

The second definition of exceptionalism is more descriptive in character, and carries less of a normative element. It is when scholars describe “the extent to which the EU’s special constitutional characteristics shape its aims, needs, and behavior on the international stage.”¹⁸ Safrin describes situations of legal

¹² MARTIN BJÖRKLUND, ‘Responsibility in the EC of Mixed Agreements – Should Non-Member States Care?’, (2001) 70 *Nordic Journal of International Law* 3, pp. 399-400.

¹³ STEFAN TALMON, ‘Responsibility of International Organizations: Does the European Community Require Special Treatment?’, in: RAGAZZI (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Leiden, Brill, 2005, pp. 405-421.

¹⁴ SABRINA SAFRIN, ‘The Un-Exceptionalism of U.S. Exceptionalism’, (2008) 41 *Vanderbilt Journal of Transnational Law* 5, p. 1307.

¹⁵ HAROLD HONGJU KOH, ‘On American Exceptionalism’, (2003) 55 *Stanford Law Review* 5, p. 1479.

¹⁶ TURKULER ISIKSEL ‘European Exceptionalism and the EU’s Accession to the ECHR’, (2016) 27 *EJIL* 3, p. 566.

¹⁷ GRAINNE DE BÚRCA, ‘The Road Not Taken: The European Union as a Global Human Rights Actor’, (2011) 105 *American Journal of International Law* 4, p. 690.

¹⁸ ISIKSEL, *supra* fn 16, p. 566.

exceptionalism “where a country or a group of countries seek a special or different legal norm for themselves during the process of negotiating a treaty and succeed in obtaining this legal accommodation.”¹⁹ Ličková, for example, understands European exceptionalism in the sense that “the factual state of affairs in which the EU members ask for and receive a growing number of EU-friendly exceptions from their international partners.”²⁰ Nolte and Aust, moreover, describe how the ‘special character’ of the EU is used to justify the argument that “other states have to arrange themselves with particularities of the special status of the EU.”²¹ Nolte and Aust also point out the problems and contradictions in the multiple definitions of the term ‘exceptionalism’, which has been used in the literature to describe quite different phenomena. The first understanding of exceptionalism focuses on the normative element – should the EU be treated differently? It presents exceptionalism in negative terms, as it amounts to unjustified special treatment. The second is descriptive – how is the EU treated differently? It is less concerned with whether the special treatment is justified, but whether the EU has been successful in negotiating certain rules and exceptions for itself. The two overlap. The very idea of what treatment is ‘justified’ or not, depends on whether you view the EU as a unique actor in international law, and if so, whether one draws legal consequences from this.

The practice of mixed agreements is often presented as an example of EU ‘exceptionalism’. From the perspective of EU external relations law, the phenomenon of mixity is a normal feature of the EU’s international relations.²² Yet from the international law perspective, mixity is still a unique phenomenon.²³ Safrin identifies three main forms of EU exceptionalism: provisions allowing participation of regional economic integration organization; built-in exceptions in multilateral treaties that accommodate EU interests; and mixed-agreements “that leave it ambiguous whether the EU or its member states bear responsibility for the implementation of and compliance with the treaties.”²⁴ Mixed agreements are described as “an exceptional mode of treaty to accommodate the unique and evolving status of the European Union” and “extraordinary and largely unprecedented agreements...”²⁵ However, just because mixity only applies in relation to one treaty actor, the EU/MS, it does not necessarily mean that it is an *unjustified* form of exceptionalism. The literature does not examine why the rules adopted to take into account the unique status are unjustified, or what other legal methods would be appropriate to address the EU’s incomplete legal powers. The fact that mixity is well-established and accepted in both multilateral and bilateral agreements, would also demonstrate that non-EU states have accepted, and continue to accept, this legal arrangement.

The question, then, is not about whether mixity is a form of exceptionalism, but at what point the practice becomes a form of unjustified exceptionalism? In instances of facultative mixity, the EU Member States become parties to an agreement where the EU could conclude the agreement alone under EU law. The CJEU has found that in some cases international law may require mixity,²⁶ and since the

¹⁹ SAFRIN, *supra* fn 14, p. 1313.

²⁰ MAGDALENA LIČKOVÁ, ‘European Exceptionalism in International Law’, (2008) 19 *EJIL* 3, p. 465.

²¹ GEORG NOLTE & HELMUT AUST, ‘European Exceptionalism?’, (2013) 2 *Global Constitutionalism* 3, p. 407.

²² See ELEFThERIA NEFRAMI, ‘Mixed Agreements as a Source of European Union Law’, in: CANNIZZARO, PALCHETTI & WESSEL (eds), *International Law as Law of the European Union*, Leiden, Martinus Nijhoff, 2011, pp. 325-349; CHRISTOPHE HILLION & PANOS KOUTRAKOS (eds), *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford, Hart Publishing, 2010; JONI HELISKOSKI, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, The Hague, Kluwer Law International, 2001.

²³ See DELANO VERWEY, *The European Community, the European Union and the International Law of Treaties*, The Hague, TMC Asser Press, 2004, p. 156.

²⁴ SAFRIN, *supra* fn 14, p. 1325 (emphasis added).

²⁵ *Ibid.*, p. 1336.

²⁶ “In the specific context of the system of Antarctic agreements, exercise by the European Union of the external competence at issue in the present cases that excludes the Member States would be incompatible with international law.” Joined Cases C-626/15 and C-659/16, *Commission v. Council* (‘Antarctica’), EU:C:2018:925, para. 128.

EU is required to exercise its powers in accordance with international law,²⁷ issues of international law become relevant when deciding on questions related to mixity. Could international law also prohibit facultative mixity in certain circumstances? In instances where the EU Member States do not exercise any competences in the fields covered by the agreement there is no rationale, from the perspective of international law, to conclude the agreement as mixed. In such instances, it exposes non-EU contracting parties to legal uncertainty, practical difficulties in application, and in many cases, delays in implementation. In such cases, facultative mixity would go beyond what is strictly necessary to allow the EU/MS to participate in the treaty, and could be an unnecessary burden on the non-EU states. The argument is not that facultative mixity itself is contrary to international law, but that such practice may lead other legal and practical problems (discussed below). For instance, the EU would not be able to invoke its internal law to justify breaches of its obligations or to evade responsibility under an agreement. Section 3 addresses some of these legal and practical issues. Aside from the legal questions about whether international law tolerates facultative mixity, non-EU states should also reflect on whether such practice should be accepted, given these difficulties.

3 Mixity and International Law

Many of the important multilateral conventions to which the EU is a party are mixed agreements, including the WTO Agreement, TRIPS and UNCLOS. The EU acceded to the United Nations Convention on the Rights of Persons with Disabilities (2006)²⁸ and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)²⁹ as mixed agreements. When the EU accedes to the European Convention on Human Rights (ECHR), that Convention will also take on the form of a mixed agreement. While mixity is a unique legal technique in international law, as discussed above, it is a practice that has gained widespread acceptance by the EU's treaty partners. Moreover, it is not just the practice of concluding agreements as mixed that has been accepted, but also the types of clauses that are included in these treaties.

The reasons for mixity derive from internal issues for the EU/MS, that is, the issue of competences in the EU legal order. The practice of mixity is also motivated by issues under international law. In some cases, the EU would not be competent at the *international level* to conclude an agreement in its own right, since it does not have the legal capacity. Mixity is thus a way to deal with this unique legal problem, by allowing the EU and the Member States to combine their competences to conclude an agreement that the EU could not otherwise be competent to conclude. Rather than insisting that only the EU Member States, or only the EU, become party to an agreement, the EU/MS were allowed to become parties together or alongside one another. In the case of bilateral mixed agreements, the EU and the Member States are usually parties 'on the one part' (and a third state or states on the other), and the EU and the Member States can be considered a 'combined' party. In the case of multilateral agreements, the EU and the Member States are viewed as parallel members. Mixity also has certain benefits for the EU's treaty partners, primarily by ensuring that there will be no gaps in implementation, since the obligations will either be carried out by the EU Member States or the Union. The question of who will actually implement the provisions internally remains largely up to the EU/MS to decide, based on issues of EU law. Nonetheless, it has been argued that mixed agreements pose difficult challenges for the EU's treaty partners, who will not always know who will be responsible for implementing certain parts of a

²⁷ *Ibid.*, 127. Case C-366/10, *Air Transport Association of America*, EU:C:2011:864, 21 December 2011, para. 123.

²⁸ Convention on the Rights of Persons with Disabilities ('CRPD'), UNTS 2514.

²⁹ Convention on the protection and promotion of the diversity of cultural expressions, UNTS 2440. See MAGDALENA LIČKOVÁ, 'The CDCE in the European Union - a Mixed Agreement and its Judicial Application', in: RICHERI HANANIA (ed), *Cultural Diversity in International Law: the Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, London, Routledge, 2014, pp. 225-237.

mixed agreement.³⁰ Despite these challenges, it appears that mixity is likely to continue for the foreseeable future.

For as long as mixed agreements have existed, there have been legal debates about the problems and issues posed by such agreements under international law. In 1998, Martin Björklund summarised some of the views in the academic debate.³¹ Some scholars were of the opinion that problems created by the implementation of mixed agreements were only internal in character, “*and of no interest from the point of view of international law and therefore nothing to worry about for any non-EC party to a mixed agreement.*”³² This viewpoint, that issues related to mixity are mainly internal in nature, appears to be shared by the Court. In *Ruling 1/78*, it stated that

“[...] it is not necessary to set out and determine, as regards other parties to the convention, the division of powers in this respect between the Community and the Member States, particularly as it may change in the course of time. It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which third parties have no need to intervene. In the present instance the important thing is that the implementation of the convention should not be incomplete.”³³

It became apparent, however, that mixity not only presented legal issues for the EU and its Member States, but was also relevant to the EU’s treaty partners. Mixity was thus not only an EU law issue, but also one that became relevant in terms of international law.

This practice, over time, may have also contributed to the development of international law. The international law of treaties exists as customary international law, and has developed over time through the practice of states, international organizations, and other legal subjects. These rules have been enshrined in the two main conventions discussed above, the VCLT and the VCLT-IO. The adoption of these two conventions did not mean, however, that the law of treaties did not continue to evolve with new practice. Indeed, at the time when the VCLT was adopted, the EU’s treaty practice was far less developed compared with today. It may be possible, therefore, for new practice, especially in the relations between the EU and non-EU states, to contribute to the development of new rules. In order for a new rule of customary international law to exist, two elements must be satisfied: there must be a widespread practice of states and international organizations that demonstrates the existence of a rule, as well as evidence that the practice is motivated by the existence of a legal obligation (*opinio juris*). The *Draft Conclusions on Identification of Customary International Law* (2018) set out that “[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.”³⁴ The practice of the EU, as an international organization, is also capable of contributing to the development of new rules of customary international law in its own right. Take, for example, the concept that the EU and the Member States may act together as a ‘combined’ treaty subject, in which the powers of the EU and the Member States are merged to establish a single treaty party. Neither the VCLT nor VCLT-IO envisage this type of treaty. However, third states that have accepted that EU and the Member States can conclude a bilateral mixed agreement as one subject, but have legal responsibility to implement certain parts of the agreement. One could

³⁰ Olson argues that “*mixed agreements present tremendous challenges for the EU’s treaty partners, who must wrestle with novel legal and practical issues imposed on their treaty-making practices by the dictates of European law and associated policy choices.*” PETER OLSON, ‘Mixity from the Outside: the Perspective of a Treaty Partner’, in: HILLION & KOUTRAKOS, *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford, Hart Publishing, 2010, p. 331.

³¹ BJÖRKLUND, *supra* fn 12, pp. 373-374.

³² *Ibid.*, p. 374.

³³ *Ruling 1/78 re the Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports*, EU:C:1978:202, para. 35.

³⁴ See Conclusion 4(2) of the *Draft Conclusions on Identification of Customary International Law, with commentaries*, UN doc. A/73/10, para. 65 at p. 119.

consider this as practice contributing towards new rules relating to composite entities. Such rules are developed through the relations between the EU/MS and other subjects of international law. What began as a novel practice to address the nature of competences in the EU legal order, could potentially be consolidated into practice that supports the emergence of rules that apply to the EU's treaty action. To support this, it would also have to be demonstrated that the EU and third states act out of a duty under international law. Third states have not only accepted the practice of mixity, but also recognise that this practice is motivated by the fact that the EU would not be competent to conclude the agreement alone. It could be argued that the EU and non-EU states view mixed agreements as necessary, deriving from international law. This argument, that the EU has the capacity to contribute to the development of customary international law, has been dealt with in more detail elsewhere.

4 Mixity and the Treaty Making Process

In which ways may the treaty practice of the EU/MS have contributed to the development of international law? While much of the focus of the literature has been on the issue of responsibility, the EU's practice may have also contributed to the law of treaties. This section goes through the steps taken by the EU/MS in concluding international agreements, looking at the issues of international law that arise during this process.

The first steps towards concluding an agreement take place when the Council authorizes the opening of negotiations. It will adopt a set of 'negotiating directives' addressed those undertaking the negotiations.³⁵ This usually takes places after a recommendation from the European Commission,³⁶ but the High Representative of the Union for Foreign Affairs and Security Policy will make such a recommendation in cases relating exclusively or principally to the CFSP.³⁷ At this stage, rules setting out the negotiating process and powers are internal in nature. The international law of treaties does not regulate the rules related to this internal process, either within states or international organizations.³⁸ This does not mean, however, that international law issues are not considered at this stage. The Commission may mention issues of public international law in its recommendation. For example, its recommendation to open negotiations on a Global Pact for the Environment mentions that "[t]he aim of EU participation in the negotiations is to maximise the international instrument's alignment with relevant EU and other international law" to justify its choice of legal basis.³⁹

4.1 *Representation and Negotiation*

Whereas the pre-negotiation phase is governed by internal law, international law does govern certain parts of the negotiation phase. It is important to ensure that negotiators actually possess the legal power to represent the legal person (a state, a group of states, or an international organization) on whose behalf they are negotiating. Article 7 VCLT and VCLT-IO set out who is capable of representing a *state* in treaty-making: when they produce appropriate full powers,⁴⁰ or where from practice or from

³⁵ See Article 218(2) TFEU.

³⁶ See Article 207(3) TFEU.

³⁷ Article 218(3) TFEU. On the CFSP, see the Chapter by Van Elsuwege in this Volume.

³⁸ VERWEY, *supra* fn 23, p. 103: "International treaty law governs neither the negotiating process nor the negotiating powers of international law."

³⁹ Recommendation for a Council Decision authorising the opening of negotiations on a Global Pact for the Environment, COM (2018) 138 final.

⁴⁰ Article 2(c) VCLT-IO defines "full powers" as "a document emanating from the competent authority of a State or from the competent organ of an international organization designating a person or persons to represent the State or the organization for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State or of the organization to be bound by a treaty, or for accomplishing any other act with respect to a treaty."

circumstances it was the intention of the parties concerned to consider that person as representing the State for such purposes.⁴¹ For States, the Heads of State, Heads of Government and Ministers for Foreign Affairs, do not need to present full powers, as they are considered to be representatives of their State. There is no corresponding provision for ex officio full powers by the delegates of international organizations, however. This reflects the fact that, for international organizations, there are no similar positions where the office holder is considered to represent the organization in international affairs.

Regarding international organizations, the VCLT-IO sets out that “[t]he capacity of an international organization to conclude treaties is governed by the rules of that organization.”⁴² This means that the question of who is capable of representing the EU for the purposes of expressing its consent to be bound, is an internal issue of EU, based on the EU Treaties and CJEU jurisprudence. Art 7 VCLT-IO sets out that

“A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organization to be bound by a treaty, if:

(a) that person produces appropriate full powers; or

(b) it appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization for such purposes, in accordance with the rules of the organization, without having to produce full powers.”

Full powers are generally issued by the secretariat of the organization, such as the UN Secretary General in the case of the United Nations,⁴³ but there is no consistent practice. It is now well-established that European Commission has the authority to represent the Union in international agreements. However, issues arise with regard to mixed agreements, as it may not be immediately clear to non-EU states whether the Commission is able to negotiate on all aspects of the international agreement. In such cases, the Member States should be viewed as having delegated their powers of negotiation to the Commission/High Representative, within the defined boundaries of the EU treaties. Over time, this contributes to practice whereby the representatives of an IO are considered capable of not only representing that organization, but also the members of that organization. While this is recognized under the EU’s internal rules, such practice has been recognised and accepted by non-EU states over time.

Consent to Be Bound

Similar questions arise regarding the consent to be bound by a mixed agreement. Article 11(2) VCLT-IO states how an international organization may express its consent to be bound by an international instrument:

“The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.”

⁴¹ Article 7(1) VCLT provides that a “*person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if: (a) he produces appropriate full powers; or (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.*”

⁴² See Article 6 VCLT-IO.

⁴³ FRANK HOFFMEISTER, ‘Article 7 - Full powers’, in: DÖRR & SCHMALENBACH (eds), *Vienna Convention on the Law of Treaties: A Commentary*, Heidelberg, Springer, 2012, p. 123.

This article reproduces the means of expressing consent under Article 11 VCLT,⁴⁴ except that the term “ratification” used in the VCLT is replaced with “act of formal confirmation”. It allows consent to be expressed by “any other means if so agreed”, thus providing international organizations with the same degree of flexibility as states. International legal persons may express consent to be bound in a number of different ways.⁴⁵ It has been noted that ‘approval’, rather than ratification, is the common method by which international organizations give their consent to be bound. This resembles ratification in municipal jurisdictions. When the EU expresses its consent to be bound, it generally does so through a Council Decision in which it states that the convention “*is hereby approved on behalf of the Union.*” The Council Decision will also include in its preamble the legal basis for the agreement and some procedural history of the agreement. The Decision may also include instructions regarding the notification of other parties to the agreement,⁴⁶ and may also specify who is to represent the Union or organs established by the agreement. Conclusion by the EU is the point at which the EU has formally expressed its consent to be bound under international law. Generally in bilateral mixed agreements, the EU/MS is one party (the EU or Union party), and does not conclude the agreement until all MS have completed their ratification processes and have submitted the ratification instrument to the Secretariat of the Council. Only then does the Council adopt its own decision approving the agreement on behalf of the Union.

There may be instances where the Council could potentially conclude an agreement in violation of EU law. This would occur, for instance, by concluding an EU-only agreement that, according to EU law, was required to be mixed (compulsory mixity). The EU institutions may have also failed to follow procedural requirements under EU law. Alternatively, the Member States may conclude an agreement that later turns out should have been concluded as an EU-only agreement. In these cases, a subject of international law (the EU or Member State) has expressed its consent to be bound in violation of its own internal law. What are the international law implications?

In the first scenario, the EU may seek to invoke this internal legal problem in order to vacate its consent to be bound. Article 46 VLCT-IO sets out that an international organization may not invoke the fact that its consent to be bound violated the rules of the organization, “*unless that violation was manifest and concerned a rule of fundamental importance.*”⁴⁷ As Kuijper points out, such issues could relate to the lack of competence or an incorrect procedure being applied, but only be invoked if violations of internal law were manifest, that is, objectively clear to other parties acting in good faith.⁴⁸ International law sets a very high threshold for establishing that a violation is ‘manifest’, and the negative wording of Article 46 VLCT-IO shows that it is to be applied in limited circumstances. States and international organizations are not under an obligation to be aware of the internal procedures of other States and international organizations related to the powers to conclude treaties.⁴⁹ Given the complex nature of EU

⁴⁴ See the Commentary to Article 11 in the Draft Articles on the Law of Treaties Between States and International Organizations or Between International Organizations, with Commentaries, UN Doc. A/37/10, para. 63 at p. 29.

⁴⁵ “International treaty law is silent on the manner in which an international organisation and its members are to express their consent to be bound in the event that they act together as a contracting party.” VERWEY, *supra* fn 23, p. 168.

⁴⁶ For example, in Council Decision 2014/210 on the conclusion on behalf of the European Union of the Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, of the other part (OJ [2014] L 111/2), the President of the Council is instructed to give the notifications provided for in Article 54 of the Agreement on behalf of the EU.

⁴⁷ See Article 46 (2) VLCT-IO.

⁴⁸ PIETER-JAN KUIJPER, ‘The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969’, (1998) 25 *LIEI* 1, p. 12.

⁴⁹ Rensmann observes: “For non-members, the rules of an international organization are, in principle, not more easily ascertainable than the internal law of a State. Just as States or international organizations do not have a general legal obligation to keep themselves informed of legal developments in other States, they also cannot be expected to have familiarized themselves with the constituent instrument, secondary law or relevant practice of

law and procedure, especially those regarding competences, violations of EU rules would unlikely be considered manifest.⁵⁰ This means that the EU and the Member States would continue to be bound, under international law, by such an agreement. This is reflected in the CJEU's finding in *France v. Commission*, that the competence of the Community to conclude an agreement is separate from the question whether the Community would be liable at the international level, in case of non-performance.⁵¹

Article 46 VCLT-IO deals with the conclusion of treaties that violate internal law. It may be a different case, however, where the question is not about a violation of EU law, but the complete *lack of power* to conclude an agreement. The reason why this may be different is because, unlike a violation of an internal procedural rule, there is a question of whether the EU actually has the power, internationally, to conclude the agreement – it is a question of *ultra vires*. In *Parliament v. Council*, the CJEU annulled the Council Decision on the conclusion of an agreement between the EU and the US on the processing and transfer of passenger data by air carriers, because of an incorrect legal basis.⁵² The Court decided to preserve the effect of the related adequacy decision, on the basis that “*the Community cannot rely on its own law as justification for not fulfilling the Agreement...*”⁵³ The treaty will continue to be valid internationally, even where the CJEU finds that it was concluded according to the incorrect legal basis. Moreover, where an agreement was concluded on the wrong legal basis, this does not mean that the EU lacked competence to conclude the agreement. There are internal procedures in place in the EU legal order designed to ensure that EU does not conclude an agreement where it is prohibited from doing so under EU law to such as the Opinion procedure under Article 218(11) TFEU. However, in a case where an agreement is concluded in violation of the EU's internal law, the EU/Member States may still incur responsibility for failure to fulfil international obligations.

4.2 Entry into Force and Provisional Application

The expression of consent to be bound is separate from the question of that agreement's entry into force on the plane of international law. The starting point is usually the treaty or convention itself. Art. 24 VCLT-IO, which mirrors the VCLT, states that:

“A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations may agree.”

Mixed agreements will often include clauses setting out in detail the circumstances under which the agreement will enter into force. Where no specific clause exists, the treaty will enter into force when the negotiating parties have expressed their consent to be bound by the agreement.⁵⁴ Treaties entered into by the Union then become binding upon the Union and the Member States⁵⁵ from the moment it enters into force.⁵⁶ In the case of treaties that require the consent of all the EU Member States, there can

an international organization to which they do not belong.” See THILO RENSMANN, ‘Article 46 - Provisions of internal law regarding competence to conclude treaties’, in: DÖRR & SCHMALENBACH (eds), *Vienna Convention on the Law of Treaties: A Commentary*, Heidelberg, Springer, 2012, p. 801.

⁵⁰ See ANTHONY AUST, *Modern Treaty Law and Practice*, Cambridge, CUP, 2013, p. 274.

⁵¹ Case C-327/91, *France v. Commission*, EU:C:1994:305, para. 25.

⁵² Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, OJ [2004] L 183/83.

⁵³ Joined Cases C-317/04 and C-318/04, *Parliament v. Council*, EU:C:2006:346, para. 73.

⁵⁴ Article 24(2) VCLT.

⁵⁵ Article 216(2) TFEU.

⁵⁶ Case 181/73, *Haegeman*, EU:C:1974:41, para. 5.

be a long period between the signing of the treaty, and the moment it enters into force.⁵⁷ Such delay can cause problems for the EU's treaty partners, who may object to such a long delay in ratification. That the EU can point to its internal procedures to justify such delay, may amount to a form of exceptionalism, since it justifies the long process on the EU's internal rules.

In the case of multilateral treaties that do not enter into force until a certain number of states have ratified the agreement, there can be a long period between the moment of signing and the moment when it enters into force. In the case of mixed agreements the process can also be delayed since the approval of all EU Member States is required. The need to include the ratification procedures of the EU Member States may result in a delay of several years. In his *Marrakesh Opinion*, Advocate General Wahl mentioned that one of the reasons for choosing not to conclude an agreement (in the field of shared or parallel competences) as mixed would be “because of the urgency of the situation and the time required for the 28 ratification procedures at national level, seriously risk compromising the objective pursued, or cause the Union to breach the principle *pacta sunt servanda*.”⁵⁸ The urgency of the situation may be a political reason to conclude the agreement as an EU-only agreement. However, this quote raises the question whether the possibility of a very long delay in ratification by the Member States may breach the principle of *pacta sunt servanda* for the Union. It is difficult to see how the long process of ratification by the EU Member States, could lead to a breach of an international obligation by the European Union, as for the purposes of ratification, they are distinct legal subjects. The possibility of a very long ratification process appears to be an inevitable part of concluding a mixed agreement with the EU/MS. However, I do not agree that the long process of ratification could lead to a ‘breach’ of the *pacta sunt servanda* principle. Cremona also questions the propriety of the practice of ‘indefinite extension’ of mixed agreements (via provisional application), especially in cases where there is little hope of the Member States ratifying.⁵⁹ As discussed above, a practice of the EU/MS may cause problems in practical terms, but this does not necessarily mean that it has breached international law. The EU is under an interim obligation “to refrain from acts which would defeat the object and purpose” of a treaty before its entry into force, but it would be difficult to show that Union practice defeats the object and purpose in such instances.

In order to address some of these practical problems, the EU often seeks to apply the terms of the agreement on a provisional basis. It does so for both bilateral and multilateral agreements.⁶⁰ Provisional application allows the terms of a treaty to be applied before the treaty has officially entered into force. In the case of mixed agreements, it allows the EU to apply the parts of the agreement applicable to it to be applied, while those related to the EU Member States are not. This can also clearly give rise to complex questions under EU and international law. Third states will seek to understand which parts of the convention apply to the Union and may be applied provisionally by it. The practice of provisional

⁵⁷ HOFFMEISTER, *supra* fn 43, p. 193: “Mixed agreements between the European Union and its Member States, on the one hand, and a third State, on the other, nowadays need 29 instruments of ratification, acceptance or approval (27 from the Member States, one from the Union, one from the third State) before they enter into force. This process takes on average 3–4 years.” See LORAND BARTELS, ‘Withdrawing Provisional Application of Treaties: Has the EU Made a Mistake?’, (2012) 1 *Cambridge Journal of International and Comparative Law* 1, pp. 112–118.

⁵⁸ Opinion of AG Wahl in Opinion procedure 3/15 re *the Marrakesh Treaty*, EU:C:2016:657, para. 121.

⁵⁹ MARISE CREMONA, ‘Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU’s Common Commercial Policy’ (2017) 8 *European Yearbook of International Economic Law*, p. 32: “difficulties may be encountered in ratifying an agreement which has been signed and is being provisionally applied, raising questions as to the propriety of an indefinite extension of provisional application.”

⁶⁰ For example, the International Agreement on Olive Oil and Table Olives, 2015 (signed in Geneva, 9 October 2015) may be applied provisionally in accordance with Article 30 of that treaty. Article 14 of the Food Assistance Convention UNTS 2884 (signed in London, 25 April 2012) sets out that any state or the European Union may “at any time deposit a notification of provisional application of this Convention with the Depositary”.

application of parts of an agreement, especially when it takes place for an extended period, exposes third states to an unnecessary level of legal uncertainty and complexity.

The practice of provisional application is governed in EU law by Article 218(5) TFEU, which sets out that “[t]he Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.”⁶¹ Article 25 of the 1969 VCLT allows a treaty, or part of a treaty, to be applied provisionally where (a) the treaty itself allows for provisional application, or (b) where the negotiating parties to the treaty have otherwise agreed. The VCLT does not set out strict rules about how treaties may be applied provisionally, as it gives room for the parties to agree to this in the agreement itself. Many agreements entered into by the Union thus include provisional application clauses, using language such as “[t]his Agreement shall be provisionally applied from the date of signature” or otherwise setting out a date from which the agreement will be applied provisionally. For example, Article 45 of the Energy Charter Treaty sets out that:

“Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations”⁶²

Some provisional application clauses contain much more detailed procedural steps. The Comprehensive Economic and Trade Agreement (CETA) between the EU and the Member States and Canada, for example, sets out details about the notification and termination of the agreement’s provisions.⁶³ In some cases, the provisional application may apply to only one part of a treaty, rather than the entire instrument.⁶⁴

Alternatively, in a mixed agreement, the Union may decide which parts of the agreement to apply provisionally. For example, the Cooperation Agreement on Partnership and Development between the European Union and its Member States and Afghanistan sets out that “*the Union and Afghanistan agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 3 of this Article, and in accordance with their respective internal procedures and legislation as applicable.*”⁶⁵ Here it is the Union, one side of the agreement, that can decide which parts of the agreement are to be applied provisionally. This can be viewed as another example of European exceptionalism, as it gives one party to the agreement the power to decide. In the Council Decision on the signing of that agreement, the EU sets out further that “*the following parts of the Agreement shall be applied provisionally ... but only to the extent that they cover matters falling within the Union’s competence ...*”⁶⁶

While the VCLT gives flexibility and scope to the parties, the practice in relation to the EU has given rise to legal questions under EU and international law. The rules on provisional application, moreover, have gained more attention in recent years. In 2011, the ILC decided to include the topic of “Provisional

⁶¹ Article 218(5) TFEU.

⁶² See Article 45 of the Energy Charter Treaty, 2080 UNTS 95.

⁶³ See Article 30.7 of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ [2017] L 11/23.

⁶⁴ For example, see Article 22 of the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems (OJ [2017] L 322/3), which provides that “[b]efore the entry into force of this Agreement, Articles 11 to 13 shall be applied on a provisional basis as from the date of signature of this Agreement.”

⁶⁵ See Article 59 of the Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, OJ [2017] L 67/3 (emphasis added).

⁶⁶ Council Decision 2017/434 on the signing, on behalf of the Union, and provisional application of the Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, OJ [2017] L 67/1.

application of treaties” in its long-term programme of work.⁶⁷ The EU welcomed the fact that the study included both the practice of states and international organizations, pointing out that “*the European Union is an actor who is actively contributing to shaping the practice in the field of provisional application of treaties.*”⁶⁸ The European Union and its Member States provided the ILC with substantial examples of its practice of provisional application of treaties with regard to mixed agreements. As with the law of treaties, one of the questions was the relevance of internal law of States and international organizations. In its *Guide to Provisional Application of Treaties*⁶⁹ Draft Guideline 12 sets out that the guidelines are without prejudice to the right of “*a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.*”⁷⁰ This is reflected in Union practice, such as the decision on the signing and provisional application of the cooperation agreement with Afghanistan, referred to above. The parts that are to be provisionally applied with respect to the Union are based on Union competence.⁷¹ The Union provided examples of agreements that state that provisional application is “without prejudice” to the parties’ constitutional requirements.⁷²

The Memorandum by the Secretariat on Provisional application of treaties, which reviews State practice in respect of bilateral and multilateral treaties deposited or registered with the Secretary-General in the last 20 years that provide for provisional application, gives only brief mention to the practice of “mixed agreements”. It is interesting, here, that the Memorandum does not use the distinction between bilateral and multilateral mixed agreements that is used in much of the literature. “*While mixed agreements are typically registered as bilateral treaties, they require the ratification, approval or acceptance of the European Union and each of its member States. Accordingly, mixed agreements share certain structural characteristics with bilateral and multilateral treaties, particularly those multilateral treaties with limited membership.*”⁷³ While bilateral mixed agreements could technically be viewed as multilateral, as they are composed of more than two states, they should still be dealt with as bilateral in nature. This is because they are structured bilaterally between two sides of the agreement.

When the EU applies an agreement provisionally, it does so with the understanding that eventually, the EU Member States will also ratify and be bound by that agreement. What are the legal implications of an EU Member State, or Member States, indicating that they will not, or cannot, ratify the agreement? There has been discussion whether the refusal or failure of a Member State to ratify the agreement would mean the Union would be legally required to discontinue provisional application. From the perspective of international law, the fact that a Member State refuses to ratify a mixed agreement would

⁶⁷ In 2012 the International Law Commission decided to include the topic “Provisional application of treaties” in its programme of work, on the basis of the recommendation of the Working Group on the long-term programme of work. See UNGA Res. 67/92 (2013) Report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions.

⁶⁸ Statement on behalf of the European Union by Lucio Gussetti, Director, European Commission, Legal Service, at the 73rd Session of the United Nations General Assembly Sixth Committee on Item 82: Report of the International Law Commission on the work of its seventieth session: Provisional application of treaties. Available at http://eueuropaeas.fpfis.slb.ec.europa.eu:8084/delegations/un-new-york/54130/eu-statement-%E2%80%93-united-nations-6th-committee-provisional-application-treaties_en.

⁶⁹ International Law Commission, Provisional application of treaties Texts and titles of the draft guidelines adopted by the Drafting Committee on first reading, UN Doc. A/CN.4/L.910.

⁷⁰ *Ibid.*, draft guideline 12.

⁷¹ See Council Decision 2017/434.

⁷² See Article 19(4) of the Agreement between the European Union and the Kingdom of Norway on supplementary rules in relation to the instrument for financial support for external borders and visa, as part of the Internal Security Fund for the period 2014 to 2020 (OJ [2017] L 75/3) which provides: “*Except for article 5, the Parties shall apply this Agreement provisionally as from the day following that of its signature, without prejudice to constitutional requirements.*”

⁷³ International Law Commission, Provisional application of treaties - Memorandum by the Secretariat, UN Doc. A/CN.4/707, para. 5.

not require the EU to stop provisional application. This is because the agreement is applied provisionally only with respect to the parts of the agreement pertaining to EU competences. The decision to end provisional application would require a decision of the EU itself, via a Council decision notifying the other treaty partners. The analysis may be different, however, in cases where it is rendered impossible, for instance under the law of an EU Member State, to ratify the agreement.⁷⁴ This question is not just a theoretical one. For instance, following the referendum in the Netherlands on the EU Association Agreement with Ukraine, questions arose regarding the non-ratification of mixed agreements due to a constitutional impossibility.⁷⁵ Wouters and Suse argue in this regard that “*the question whether the EU is under a legal obligation to discontinue the provisional application of an agreement once it has become clear that a Member State has permanently and definitively failed to ratify a mixed agreement remains open.*”⁷⁶ As argued above, there does not appear to be a legal reasons based in international law, that the EU should discontinue provisional application in such circumstances, especially given that the EU and the Member States are distinct parties in these instances. Moreover, it is difficult to identify when a Member State has “permanently and definitively” failed to ratify a mixed agreement. The problem is less a legal one for the Union, and more a practical and political one, since non-ratification of mixed agreements and long delay have negative consequences for the EU’s treaty partners. Such practice exposes the EU’s treaty partners to the complexities of EU competence questions in a way that negatively impacts those parties, and can be viewed as another form of unjustified exceptionalism.

4.3 Implementation

Questions of international law also arise in regard to the implementation of the agreement by the EU/MS once it enters into force. As discussed above, the main problem that has been discussed in the literature, relates to the issue of responsibility. The EU tends to view its internal balance of competences as an internal matter, one that should not be enshrined in an international treaty. The concern is that non-EU parties will not know which party to bring a dispute against in instances where there is a breach of an obligation.⁷⁷ One might argue that this potential problem is reduced in the cases where a multilateral agreement includes a clause requiring the EU and the Member States to submit a declaration of competences, setting out which party has responsibility for the implementation of the agreement. However, not all multilateral agreements to which the Union and the Member States are parties include such a clause. Even in cases where a declaration has been submitted, these are widely recognised as being so vague that they do not offer real guidance, and they are quickly out of date, based on the dynamic nature of competences within the EU legal order.⁷⁸ In many cases, the EU is under an obligation to update its declarations of competence, but in practice, this has rarely occurred. There are practical difficulties with updating such clauses, and they can give rise to politically sensitive debates about the balance of competences. UNCLOS, for example, requires that “[t]he international organization and its member States which are States Parties shall promptly notify the depositary of this Convention of any changes to the distribution of competence, including new transfers of competence.”⁷⁹

⁷⁴ This issue has been discussed in more detail in ANDREI SUSE & JAN WOUTERS, ‘Exploring the Boundaries of Provisional Application: The EU’s Mixed Trade and Investment Agreements’, (2019) 53 *Journal of World Trade* 3, p. 411. They argue that “*from an international law perspective, a Member State’s notification of its intention not to ratify the agreement cannot preclude the EU from provisionally applying the agreement.*”

⁷⁵ See e.g. GUILLAUME VAN DER LOO & RAMSES WESSEL, ‘The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions’, (2017) 54 *CMLRev.* 3, pp. 742–43.

⁷⁶ SUSE & WOUTERS, *supra* fn 74, p. 415.

⁷⁷ “*Third parties can easily get into a situation where they do not know whether the EC or its Members or both are to be held responsible for a breach of treaty provisions, and whether they are actually suing the right party.*” See EVA STEINBERGER, ‘The WTO Treaty as a Mixed Agreement: Problems with the EC’s and the EC Member States’ Membership of the WTO’, (2006) 17 *EJIL* 4, p. 847.

⁷⁸ See ANDRÉS DELGADO CASTELEIRO, ‘EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?’, (2012) 17 *EFAR* 4, p. 492.

⁷⁹ See Article 5(4), Annex IX, United Nations Convention on the Law of the Sea (‘UNCLOS’), UNTS 1833.

Since declarations of competence are meant to be informative for the third parties, the rationale for updating them over time is clear. The only example of the EU seeking to update its declaration of competences was with regard to its FAO membership.⁸⁰ Updating the FAO declaration of competences to reflect post-Lisbon developments has proven difficult, however, due to disagreements within the Council.

One of the international law questions that arises is whether it is the content of the declaration, or the actual balance of competences at any given moment, that is determinative. Talmon, for instance, argues that it is the declaration that is decisive.⁸¹ There has been also some debate on whether the EU and the Member States are both bound by an agreement in its entirety, or only to the extent to which they have declared that they exercise competences in a specific area. Steinberger, for instance, describes the WTO agreement (where no declaration of competences exists) as “*a mixed system of ‘coexistent’ and ‘concurrent’ EC competences*” in which both the EU and the Member States are bound by the entire agreement.⁸² The question turns on the legal nature of declarations of competence under international law. Declarations of competence are made pursuant to the terms of the agreement itself and, while not technically constituting a part of the agreement, are highly significant for the purposes of interpretation. This corresponds with Article 31(2)(b) VCLT, which allows the use of “[a]ny instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty” when determining the context for the purpose of interpretation. In cases where there is a mis-match between the content of a declaration of competence, and the actual balance of competences, the declaration made pursuant to the treaty, should be used for the purposes of interpretation.

Declarations of competence have utility beyond determining the issue of responsibility. The declaration of competences gives notice to non-EU parties the extent of legal obligations, clarifies who will implement the parts of the agreement, and can determine who may vote and participate in institutions and bodies established by the agreement.⁸³ However, the use of such declarations has also been put forward as a form of exceptionalism. As Olson argues, declarations of competence are not practically useful for the EU’s treaty partners, since “[d]eclarations rarely, if ever, include something which would be far more informative: an article-by-article [...] analysis informing treaty partners clearly and in detail which entity will be exercising which rights and performing which obligations.”⁸⁴ Such an article-by-article listing, however, would probably not be helpful to a third state, since it can only ever be a snapshot of legal situation at the time that the agreement was concluded. The practical utility of declarations of competence has been questioned for quite some time. The problems identified with such declarations are that they are vague, quickly become inaccurate or obsolete, and that they offer third parties very little guide on the actual division of competences in any area. This is a consequence of the dynamic nature of competences, as well as the way that international agreements are drafted, which

⁸⁰ See Communication from the Commission to the Council, ‘The role of the European Union in the Food and Agriculture Organisation (FAO) after the Treaty of Lisbon: Updated Declaration of Competences and new arrangements between the Council and the Commission for the exercise of membership rights of the EU and its Member States’ 29 May 2013. Attempts to update the declaration to reflect the post-Lisbon developments were made in 2013-2015. The Communication was subsequently discussed in the Council. However, the updated declaration has not been adopted or communicated to the FAO.

⁸¹ Talmon notes that “*it is not the division of competence as laid down in the rules of the organization that is decisive but the division of competence as declared to the other parties to the treaty.*” (emphasis in original). See TALMON, *supra* fn 13, p. 418.

⁸² Steinberger remarks that “[t]he WTO Agreement is consequently a mixed system of ‘coexistent’ and ‘concurrent’ EC competences.” See STEINBERGER, *supra* fn 77, p. 848.

⁸³ According to Delgado Casteleiro, “[w]ithin these multilateral conventions, third parties want to know beforehand who is voting (to avoid a double exercise of voting rights), who is implementing (to ensure compliance) and who is responsible for a breach of the agreement (even before an internationally wrongful act has been committed).” DELGADO CASTELEIRO, *supra* fn 78, p. 492.

⁸⁴ See OLSON, *supra* fn 30, p. 345.

do not neatly coincide with power divisions in EU law. Add to that the politically sensitive nature of competences, it is inevitable that declarations of competence are unhelpful guides.

5 Conclusion

European exceptionalism has been conceptualized in different ways. First, it can be viewed as third states *tolerating* the EU's double standards and insistence of special rules. Second, it can be used to describe the EU *justifying* certain exceptions for itself. This chapter sought to bring the discussion beyond the question of whether the practice of mixity is a form of exceptionalism, but whether such practice, has over time also contributed to the development of new rules of the law of treaties. The practice of mixity was originally an innovation in international law, one that allowed the EU and the Member States to combine their competences to conclude a treaty as one party, or alongside one another. This legal innovation brought with it new legal questions under international law, pertaining to international responsibility, negotiation, consent to be bound, implementation and provisional application. One may look to the VCLT and VCLT-IO and conclude that there are no provisions that apply to the EU's unique legal practice in these areas. However, one may regard EU practice to have contributed to the development of new rules that allow for the practice of mixity, to which non-EU states have given their consent through that continued practice. In particular, it shows that in certain circumstances, the EU's treaty partners have consented to the internal rules of the organization to be taken into account. Such practice becomes less justified, it is argued, when they are not merely necessary to take into account the EU's complex legal order, but subject non-EU states to legal uncertainty, delay or the evasion of obligations.